FILED
JUL 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: NOVEMBER 7, 2005
CERTIORARI GRANTED: MAY 15, 2006

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General Docket
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Court of Appeals Docket #: 04-5716 Filed: 6/18/04
Nsuit: 2360 P.I.: Other
Osborn v. Haley, et al
Appeal from: Western District of Kentucky at Paducah

* * * * *

Docket as of May 18, 2006 9:25 pm

* * * * *

04-5716 Osborn v. Haley, et al

6/18/04	Civil Case Docketed Notice filed by Appellant Barry Haley. Transcript needed: n (ac) [04-5716]
6/18/04	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 7/28/04; appellee brief due 8/30/04; reply brief due 9/16/04; appendix due 9/23/04; final briefs due 10/14/04. [04-5716] (ac) [04-5716]
6/18/04	Electronic case filing. District court record can downloaded electronically. [04-5716] (ac) [04-5716]
6/28/04	APPEARANCE filed by Attorney Barbara L. Herwig for Appellant Barry Haley [04-5716] (ac) [04-5716]
6/28/04	APPEARANCE filed by Attorney Peter R. Maier for Appellant Barry Haley [04-5716] (ac) [04-5716]
6/28/04	PRE-ARGUMENT STATEMENT filed by Peter R. Maier for Appellant Barry Haley [04-5716] (ac) [04-5716]

04-5716 Osborn v. Haley, et al

6/28/04	TRANSCRIPT ORDER FORM filed by Peter R. Maier for Appellant Barry Haley: No hearings held in District Court. [04-5716] [2983693-1] (blh) [04-5716]
7/15/04	ORDER filed to consolidate for briefing and submission cases 04-5716/5820 [04-5716, 04-5820] (ac) [04-5716 04-5820]
7/15/04	BRIEFING LETTER SENT setting pro se briefing schedule: appellant brief due 8/24/04; appellee brief due 9/27/04; reply brief due 10/14/04; appendix due 10/21/04. (ac) [04-5716 04-5820]
7/19/04	Appellant MOTION filed to extend time to 8/27 to file brief. Motion filed by Barbara L. Herwig and Peter R. Maier for Appellant Barry Haley. Certificate of service 7/16/04 [04-5716] (ac) [04-5716]
7/19/04	RULING declaring as moot the motion to extend briefing [2991939-1] filed by Barbara L. Herwig, Peter R. Maier. Briefing was reset when the related appeal (04-5820) was docketed [04-5716] (ac) [04-5716]
8/11/04	Appellant MOTION filed to extend time to 9/7 to file brief. Motion filed by Barbara L. Herwig and Peter R. Maier for Appellant Barry Haley. Certificate of service date 8/10/04 [04-5716] (ac) [04-5716]

04-5716 Osborn v. Haley, et al

8/18/04	LETTER SENT by ac granting motion to extend briefing [3005539-1] filed by Barbara L. Herwig, Peter R. Maier, Thomas Miller, [3007396-1] resetting briefing schedule: [04-5716, 04-5820] appellant brief due now 9/7/04; appellee brief now due 10/7/04; reply brief now due 10/21/04; appendix now due 10/28/04; final briefs now due 11/18/04. (ac) [04-5716 04-5820]
9/3/04	PROOF BRIEF filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Certificate of service date 9/2/04. Number of Pages: 40. [04-5716] (lmn) [04-5716]
9/3/04	Request to require oral argument filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. [04-5716] (lmn) [04-5716]
9/8/04	BRIEFING LETTER SENT requesting proof brief corrections from Peter R. Maier because corporate disclosure statement is missing; Page #1 should be the jurisdictional statement; more information needed for references. Corrections due: 9/22/04. (lmn) [04-5716]
9/22/04	Corrected Appellant's proof brief filed by Peter R. Maier and Barbara L. Herwig. Copies: 1. Certificate of Service date 9/21/04 [04-5716] (lmn) [04-5716]
10/7/04	BRIEF filed by Pat Osborn for Appellee Pat Osborn. Copies: 7. Certificate of service date 10/4/04. Number of Pages: 2. [04-5716, 04-5820] (lmn) [04-5716 04-5820]

04-5716 Osborn v. Haley, et al

10/29/04	APPENDIX filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Copies: 5 (One volume). Certificate of service date 10/27/04. [04-5716, 04-5820] (lmn) [04-5716 04-5820]
10/29/04	FINAL BRIEF filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Copies: 7. Certificate of service date 10/27/04. Number of Pages: 41. [04-5716] (lmn) [04-5716]
10/29/04	Request to require oral argument filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. [04-5716] (lmn) [04-5716]
11/18/04	APPEARANCE filed by Attorney J. Duncan Pitchford for Appellant Land Between the Lak, Appellant Gaye Luber in 04-5820 [04-5820] (yh) [04-5820]
4/8/05	Submission on briefs date set for June 1, 2005, Notice sent to counsel. (pjm) [04-5716 04-5820]
6/1/05	CAUSE SUBMITTED on briefs to panel consisting of Judges Moore, Cook, Gwin sitting on 06.01.05. [04-5716, 04-5820] (kal) [04-5716 04-5820]

04-5716 Osborn v. Haley, et al

9/8/05	OPINION filed: The district court's denial of substitution and remand orders are VACATED and the case is REMANDED for further proceedings, decision for publication pursuant to local rule 206. [04-5716, 04-5820] Karen N. Moore, Circuit Judge, Deborah L. Cook, Authoring Judge, James Gwin, U.S. District Judge for the N.D. of OH. (ac) [04-5716 04-5820]
9/8/05	JUDGMENT: VACATED and remanded. (ac) [04-5716 04-5820]
11/2/05	MANDATE ISSUED with no cost taxed [04-5716, 04-5820] (ac) [04-5716 04-5820]
11/29/05	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Pat Osborn in 04-5716, Appellee Pat Osborn in 04-5820. Filed in the Supreme Court on 11-07-05, Supreme Ct. case number: 05-593. [04-5716, 04-5820] (swh) [04-5716 04-5820]
5/18/06	U.S. Supreme Court letter filed granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn. In addition to the Questions presented by the petition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. Sec. 1447(d) [04-5716, 04-5820] Supreme Court No. 05-593 in 04-5716, granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn [04-5716, 04-5820] in 04-5820. Filed in the Supreme Court on 05-15-06. (swh) [04-5716 04-5820]

General Docket
US Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 04-5820 Filed: 7/15/04
Nsuit: 4360 P.I.: Other
Osborn v. Haley, et al
Appeal from: Western District of Kentucky at Paducah

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Docket as of May 18, 2006 9:25 pm

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04-5820 Osborn v. Haley, et al

7/15/04	Civil Case Docketed. Notice filed by Appellants Gaye Luber, Land Between the Lak. Transcript needed: n (ac) [04-5820]
7/15/04	Electronic case filing. District court record can be downloaded electronically. [04-5820] (ac) [04-5820]
7/15/04	ORDER filed to consolidate for briefing and submission cases 04-5716/5820 [04-5716, 04-5820] (ac) [04-5716 04-5820]
7/15/04	BRIEFING LETTER SENT setting pro se briefing schedule: appellant brief due 8/24/04; appellee brief due 9/27/04; reply brief due 10/14/04; appendix due 10/21/04. (ac) [04-5716 04-5820]
7/15/04	APPEARANCE filed by Attorney C. Thomas Miller for Appellants Land Between the Lak, Gaye Luber. [04-5820] (ac) [04-5820]
7/15/04	PRE-ARGUMENT STATEMENT filed by C. Thomas Miller for Appellants Land Between the Lak, Gaye Luber. 04-5820 [04-5820] (ac) [04-5820]

04-5820 Osborn v. Haley, et al

7/20/04	TRANSCRIPT ORDER FORM filed by C. Thomas Miller for Appellant Land Between the Lak, Appellant Gaye Luber: No hearings held in District Court. [04-5820] [2994328-1] (blh) [04-5820]
8/16/04	Appellant MOTION filed to extend time to 8/27 to file brief. Motion filed by C. Thomas Miller for Appellant Land Between the Lak, Appellant Gaye Luber. Certificate of service date 8/13/04 [04-5820] (ac) [04-5820]
8/18/04	LETTER SENT by ac granting motion to extend briefing [3005539-1] filed by Barbara L. Herwig, Peter R. Maier, Thomas Miller, [3007396-1] resetting briefing schedule: [04-5716, 04-5820] appellant brief due now 9/7/04; appellee brief now due 10/7/04; reply brief now due 10/21/04; appendix now due 10/28/04; final briefs now due 11/18/04. (ac) [04-5716 04-5820]
9/7/04	PROOF BRIEF filed by C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. Certificate of service date 9/3/04. Number of Pages: 16. [04-5820] (lmn) [04-5820]
9/7/04	Request to require oral argument filed by C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. [04-5820] (lmn) [04-5820]
10/7/04	BRIEF filed by Pat Osborn for Appellee Pat Osborn. Copies: 7. Certificate of service date 10/4/04. Number of Pages: 2. [04-5716, 04-5820] (lmn) [04-5716 04-5820]

04-5820 Osborn v. Haley, et al

10/29/04	APPENDIX filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Copies: 5 (One volume). Certificate of service date 10/27/04. [04-5716, 04-5820] (lmn) [04-5716 04-5820]
11/8/04	TENDERED : Appellant's Final Brief from J. Duncan Pitchford for Appellant Land Between the Lakes and Gaye Luber. Waiting for Notice of appearance from Mr. Pitchford. [04-5820] (lmn) [04-5820]
11/8/04	FINAL BRIEF filed by J. Duncan Pitchford and C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. Copies: 7. Certificate of service date 11/5/04. Number of Pages: 16. [04-5820] (lmn) [04-5820]
11/8/04	Request to require oral argument filed by J. Duncan Pitchford and C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. [04-5820] (lmn) [04-5820]
11/18/04	APPEARANCE filed by Attorney J. Duncan Pitchford for Appellant Land Between the Lak, Appellant Gaye Luber in 04-5820 [04-5820] (yh) [04-5820]
4/8/05	Submission on briefs date set for June 1, 2005, Notice sent to counsel. (pjm) [04-5716 04-5820]
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04-5820 Osborn v. Haley, et al

9/8/05	OPINION filed: The district court's denial of substitution and remand orders are VACATED and the case is REMANDED for further proceedings, decision for publication pursuant to local rule 206. [04-5716, 04-5820] Karen N. Moore, Circuit Judge, Deborah L. Cook, Authoring Judge, James Gwin, U.S. District Judge for the N.D. of OH. (ac) [04-5716 04-5820]
9/8/05	JUDGMENT: VACATED and remanded. (ac) [04-5716 04-5820]
11/2/05	MANDATE ISSUED with no cost taxed [04-5716, 04-5820] (ac) [04-5716 04-5820]
11/29/05	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Pat Osborn in 04-5716, Appellee Pat Osborn in 04-5820. Filed in the Supreme Court on 11-07-05, Supreme Ct. case number: 05-593. [04-5716, 04-5820] (swh) [04-5716 04-5820]
5/18/06	U.S. Supreme Court letter filed granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn. In addition to the Questions presented by the petition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. Sec. 1447(d) [04-5716, 04-5820] Supreme Court No. 05-593 in 04-5716, granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn [04-5716, 04-5820] in 04-5820. Filed in the Supreme Court on 05-15-06. (swh) [04-5716 04-5820]

U.S. District Court
Western District of Kentucky (Paducah)
CIVIL DOCKET FOR CASE #: 5:03-cv-00192-TBR

Osborn v. Haley et al
Assigned to: Judge Thomas B. Russell
Cause: 28:1446 Petition for Removal- Personal Injury

Date Filed: 08/20/2003
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: U.S. Government Defendant

* * * * *

[Docket as of June 12, 2006]

Date Filed	#	Docket Text
08/20/2003	1	NOTICE OF REMOVAL from Trigg County Circuit Court, case number 03-CI-00119, filed by Barry Haley, Land Between the Lakes Association, Inc., and Gaye Luber. (Attachments: # 1 Exhibit 1 (2) Exhibit 2 (3) Cover Sheet) (SGH) (Entered: 08/25/2003)
08/20/2003	2	Case Assignment (Random Selection): Case Assigned to Judge Thomas B. Russell. (SGH) (Entered: 08/25/2003)
08/20/2003	3	MOTION for Extension of Time to File Answer by Barry Haley, Land Between the Lakes Association, Inc., and Gaye Luber. Responses due by 8/28/2003 (Attachments: # 1 Proposed Order) (SGH) (Entered: 08/25/2003)

Date Filed	#	Docket Text
09/05/2003	4	ORDER by Judge Thomas B. Russell on 8/31/03; granting 3 Motion for Extension of Time to Answer up to & including 10/20/03 to file its initial pleading (cc: all counsel) (KJI) (Entered: 09/05/2003)
10/16/2003	5	MOTION for Extension of Time to File Answer an additional 30 days by Barry Haley. (Attachments: # 1 Proposed Order) (KJI) (Entered: 10/20/2003)
10/24/2003	6	ORDER by Thomas B. Russell on 10/22/03: granting 5 Motion for Extension of Time to Answer an additional 30 days. (cc: all counsel) (KJI) (Entered: 10/24/2003)
11/19/2003	7	ANSWER to Complaint by Barry Haley, Land Between the Lakes Association, Inc., Gaye Luber.(KJI) (Entered: 11/20/2003)
11/25/2003	8	ORDER by Judge Thomas B. Russell on 11/25/03: Scheduling Conference set for 1/12/2004 at 2:45 PM before Judge Thomas B. Russell. (cc: all counsel) (KJI) (Entered: 11/25/2003)
12/03/2003	9	NOTICE FOR CORRECTED SERVICE by Land Between the Lakes Association, Inc., Gaye Luber. (KJI) (Entered: 12/03/2003)
12/18/2003	10	AMENDMENT TO PROPOSED DISCOVERY PLAN by Pat Osborn. (KJI) (Entered: 12/18/2003)

Date Filed	#	Docket Text
01/09/2004	11	MOTION to Substitute Party United States for Barry Haley by Land Between the Lakes Association, Inc. Responses due by 1/27/2004 (Attachments: # 1 Certification # 2 Proposed Order) (KJI) (Entered: 01/12/2004)
01/09/2004	12	MOTION to Stay Discovery by Land Between the Lakes Association, Inc. Responses due by 1/27/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 01/12/2004)
01/09/2004	13	MOTION to Dismiss by Land Between the Lakes Association, Inc. [N.B.: should be: "by United States"] Responses due by 1/27/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 01/13/2004)
01/16/2004	14	ORDER by Judge Thomas B. Russell on 1/12/04: Telephone Conference set for 3/10/2004 at 8:45 AM before Judge Thomas B. Russell. (cc: all counsel, pla) (KJI) (Entered: 01/16/2004)
01/27/2004	15	RESPONSE to Motion re 13 MOTION to Dismiss by Pat Osborn. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Proposed Order) (KJI) (Entered: 01/27/2004)
01/29/2004	16	MOTION to Dismiss by Land Between the Lakes Association, Inc.; Gaye Luber. Responses due by 2/17/2004 (Attachments: # 1 Memorandum in Support # 2 Proposed Order) (KJI) (Entered: 01/29/2004)

Date Filed	#	Docket Text
02/09/2004	17	REPLY to Response to Motion re 13 MOTION to Dismiss by Land Between the Lakes Association, Inc. [N.B.: should be: "by United States"] (KJI) (Entered: 02/10/2004)
02/25/2004	18	REPLY to Response to Motion re 16 MOTION to Dismiss by Land Between the Lakes Association, Inc., Gaye Luber. (KJI) (Entered: 02/25/2004)
03/12/2004	19	MEMORANDUM AND OPINION by Judge Thomas B. Russell on 3/10/04: separate order entered this date consistent w/ memo opinion (cc: all counsel) (KJI) (Entered: 03/12/2004)
03/12/2004	20	ORDER by Judge Thomas B. Russell on 3/10/04: Remanding case to Trigg Circuit Court (cc: all counsel, Trigg Circuit Court) (KJI) (Entered: 03/12/2004)
03/24/2004	21	MOTION to Stay Remand Order by Barry Haley; Land Between the Lakes Association, Inc. Responses due by 4/12/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 03/25/2004)
03/24/2004	22	MOTION for Reconsideration re 19 Memorandum & Opinion, 20 Order Dismissing Case by Barry Haley. Responses due by 4/12/2004 (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Proposed Order # 4 Proposed Order) (KJI) Modified on 4/27/2004 (deleted incorrect filer) (KJI). (Entered: 03/26/2004)

Date Filed	#	Docket Text
04/06/2004	23	RESPONSE to Motion re 22 MOTION for Reconsideration re 19 Memorandum & Opinion, 20 Order Dismissing Case by Pat Osborn. (Attachments: # 1 Proposed Order) (KJI) (Entered: 04/06/2004)
04/19/2004	24	MOTION for Extension of Time to File Reply to Response to Motion to Reconsider by Barry Haley. Responses due by 4/27/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 04/20/2004)
04/26/2004	25	REPLY to Response to Motion re 22 MOTION for Reconsideration re 19 Memorandum & Opinion, 20 Order Dismissing Case by Barry Haley. (Attachments: # 1 Exhibit) (KJI) (Entered: 04/27/2004)
04/29/2004	26	ORDER by Judge Thomas B. Russell on 4/24/04; granting 24 Motion for Extension of Time to File Reply up to 4/26/04 (cc: all counsel) (KJI) (Entered: 04/29/2004)
05/13/2004	27	ORDER by Judge Thomas B. Russell on 5/13/04; denying 21 Motion to Stay, denying 22 Motion for Reconsideration (cc: all counsel) (KJI) (Entered: 05/13/2004)
06/14/2004	28	NOTICE OF APPEAL as to 27 Order on Motion to Stay, Order on Motion for Reconsideration by Barry Haley. (KJI) (Entered: 06/15/2004)

Date Filed	#	Docket Text
06/18/2004	29	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 28 Notice of Appeal (KJI) (Entered: 06/18/2004)
06/18/2004		USCA Case Number 04-5716 for 28 Notice of Appeal filed by Barry Haley. (KJI) (Entered: 06/18/2004)
06/22/2004	30	NOTICE OF APPEAL as to 19 Memorandum & Opinion, 20 Order Dismissing Case, 27 Order on Motion to Stay, Order on Motion for Reconsideration, by Land Between the Lakes Association, Inc., Gaye Luber. Filing fee $ 255, receipt number 13696. (Attachments: # 1 Receipt) (KJI) (Entered: 06/23/2004)
06/25/2004	31	DESIGNATION of Record on Appeal by Barry Haley re 28 Notice of Appeal (KJI) (Entered: 06/25/2004)
06/28/2004	32	TRANSCRIPT REQUEST by Barry Haley No Hearings re 28 Notice of Appeal (KJI) (Entered: 06/29/2004)
06/29/2004	33	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 30 Notice of Appeal (KJI) (Entered: 06/29/2004)
07/02/2004	34	TRANSCRIPT REQUEST by Land Between the Lakes Association, Inc., Gaye Luber re 30 Notice of Appeal, no hearings (KJI) (Entered: 07/02/2004)

Date Filed	#	Docket Text
07/02/2004	35	DESIGNATION of Record on Appeal by Lar.d Between the Lakes Association, Inc., Gaye Luber re 30 Notice of Appeal (KJI) (Entered: 07/02/2004)
10/07/2004	36	NOTICE of Appearance by Michael D. Ekman on behalf of on behalf of Barry Haley Substitution for: Brady Miller (Ekman, Michael) (Entered: 10/07/2004)
11/07/2005	37	MANDATE of USCA as to 30 Notice of Appeal, filed by Gaye Luber,, Land Between the Lakes Association, Inc., 28 Notice of Appeal filed by Barry Haley; remanding case for further proceedings (KJS) (Entered: 11/09/2005)
12/06/2005		Remark : Received letter from Supreme Court of the United States addressed to US Court of Appeals advising that a petition for writ of certiorari was filed on 11/7/05 and placed on the docket 11/10/05 as 05-593. (KJS) (Entered: 12/06/2005)
05/22/2006	38	Letter from Office of the Clerk, Supreme Court of the United States that petition for writ of certiorari granted. (CSD) (Entered: 05/22/2006)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Case No. 5:03CV-192-R

[Filed Jan. 27, 2004]

PAT OSBORN — PLAINTIFF

vs. **PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION TO DISMISS**

BARRY HALEY,
ET AL — DEFENDANTS

Plaintiff Pat Osborn requests the court to deny the United States' motion to dismiss plaintiff's complaint, and in support thereof, submits the following memorandum of law.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REQUEST TO DENY UNITED STATE'S MOTION TO DISMISS

Summary of Argument

A. Plaintiff's complaint alleges facts that show defendant Barry Haley acted outside the scope of his employment when performing the acts which form the basis of plaintiff's complaint.

B. Plaintiff has information that leads her to believe that a written "Memorandum of Understanding" executed by USDA Forest Service and LBLA, in effect at the time of her discharge, specifically prohibited Forest Service employees from participating in any LBLA decision regarding the hiring or firing of LBLA employees.

C. Defendant Barry Haley's conduct in causing plaintiff to be fired for filing a veterans preference inquiry fails the scope of employment test under Kentucky Law as set out in ***Coleman v. United States***.

Argument

I. Factual Background.

Defendant was employed by USDA Forest Service, a United States government agency. Plaintiff was employed by LBLA, a private association. Plaintiff applied for a job with USDA Forest Service. When plaintiff did not get the job with USDA Forest Service, she exercised her right to file a veterans' preference inquiry with the U.S. Department of Labor. Defendant Barry Haley became aware of the fact that plaintiff had filed a veterans' preference inquiry. Defendant Barry Haley acted to cause plaintiff's employer, LBLA, to fire plaintiff. Complaint pages 1-5, 7, 8, 10.

II. Defendant Barry Haley acted outside the scope of his employment.

A. Plaintiff's complaint alleges that defendant Barry Haley was ". . . acting outside the scope of his employment." Complaint page 7. After finding out from a Department of Labor investigator that plaintiff had filed a veterans' preference inquiry (Complaint page 4), defendant Barry Haley ". . . induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff from her job with defendant LBLA in retaliation for plaintiff filing a veterans' preference inquiry[."] (Complaint page 7).

B. Attached to this response as "Exhibit A" is a copy of a draft of a Memorandum of Understanding between U.S. Forest Service and LBLA. It states in item 3 at the bottom of page 4 "**A Forest Service employee shall not participate in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including, but not limited to executing or negotiating contracts, signing checks, OR HIRING OR FIRING LBLA EMPLOYEES**. (Emphasis added). Filed with this response as "Exhibit B" is plaintiff's affidavit stating that she has information credible information that a similar Memorandum of Understanding was executed and in effect for the period in which she was fired from her job.

C. In *Coleman v. United States*, 91 F.3d 820 (6th Cir. 1996), the court states four factors to consider under Kentucky law to determine if an employee is acting in the scope of his employment. 1) Whether the conduct was similar to that which the employee was hired to perform; (2) whether the action occurred substantially within the authorized spacial and temporal limits of the employment; (3) whether the action was in furtherance of the employer's business; and (4) whether the conduct, though unauthorized, was expectable in view of the employee's duties. Citing *Flechsig v. United States*, 991 F.2d 300, 303 (6th Cir. 1992); *Frederick v. Collins*, 378 S.W.2d 617, 619 (Ky. Ct. App. 1964); *Wood v. Southeastern Greyhound Lines*, 194 S.W.2d 81, 83 (Ky. Ct. App. 1946).

Defendant Barry Haley's conduct fails test 1 because he was not hired by U.S. Forest Service to interfere in the employment relationship of a private individual employed by a private association. This was prohibited conduct.

Defendant Barry Haley's conduct may or may not have occurred at his employer's place of business as discussed in test 2, but this is irrelevant if the conduct itself was prohibited.

Defendant Barry Haley's conduct was not in furtherance of the U.S. Forest Service business as required in test 3, and in fact acted to taint the image of his employer by having a veteran fired from her job for exercising a legal right.

Finally, defendant Barry Haley's conduct was not authorized by his employer as required in test 3. In fact, in the draft Memorandum of Understanding discussed above, defendant's conduct was **SPECIFICALLY PROHIBITED** by defendant's employer (emphasis added).

Finally, plaintiff has attached as "Exhibit C" a letter from Mr. Robert Kuenzli, the Department of Labor investigator who spoke with defendant Barry Haley concerning

plaintiff's veterans preference inquiry. The letter is to Mr. Kuenzli's supervisor and states that plaintiff was fired because of the inquiry. While the letter may not be admissible at trial, Mr. Kuenzli is expected to testify on plaintiff's behalf.

Conclusion

The United States' motion to dismiss should be denied for the reasons outlined. In addition, the Attorney General's certification that defendant Barry Haley was acting in the scope of his employment should be reversed. Barry Haley should be resubstituted as defendant in this action if he has been removed. In addition, any stay that has entered relating to discovery should be lifted. A proposed order is attached.

It is plaintiff's position that her complaint alleges facts that, when viewed in the manner most favorable to plaintiff, show that defendant Barry Haley's conduct was outside the scope of his employment and should survive the United States' motion to dismiss. If the court were to view the complaint as fatally defective, plaintiff will file a motion pursuant to Rule 15(a), FRCP to amend her complaint to include the additional facts alleged in this response. In this case, plaintiff would ask the court to postpone ruling on the motion to dismiss until she can prepare a motion to amend her complaint. Again, it is plaintiff's position that this is not necessary and the motion to dismiss should be dismissed.

DATED: 1-26-04 BY: /s/ Pat Osborn

Pat Osborn
[address and telephone number]

PLAINTIFF PRO SE

[Certificate of service omitted in printing]

[Exhibit A]

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
USDA FOREST SERVICE & LBLA
Federal Fiscal Year 2001

[The remainder of the text on this page is handwritten.]

9/22/00 FY01
Final Version
Expired—> 9/30/01

/s/ William P. Lisowsky
William P. Lisowsky
Area Supervisor

Please
See P's 4 & 5
herein

Fs agreement No. 11086001-020
Cooperator Tax # [blacked out]
9/22/00

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
USDA FOREST SERVICES, LBL NRA
AND THE
LAND BETWEEN THE LAKES ASSOCIATION

The USDA Forest Service, LBL NRA (Forest Service), and the Land Between The Lakes Association (LBLA), hereby enter into the following Memorandum of Understanding (MOU).

WITNESSETH:

Whereas, the Forest Service is responsible for developing the National Forest resources for sustained yields of products and services in the best combination for the use, enjoyment, and education of the American people, as provided in the Organic Administration Act of 1897, the Multiple-Use Sustained-Yield Act of 1960, and other laws. It is the policy of Congress that the National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.

Whereas, the Forest Service is conducting a program to provide facilities within the National Forest for outdoor recreational and educational activities for the public; and

Whereas, the Forest Service deems it desirable to provide educational and interpretive information about the forest resources, natural phenomena, local history, and similar matters; and

Whereas, the LBLA has as a purpose the promotion of the educational, historical, scientific, and other values of LBL and of assisting educational and interpretive activities of the Forest Service;

Now therefore, in consideration of the above premises, the parties agree as follows:

A. LAND BETWEEN THE LAKES ASSOCIATION SHALL:

1. Administer and staff each of LBL's three visitor receptionist facilities—the North and South Welcome Stations and the Golden Pond Visitor Center.

a. Greet and orient visitors.

b. Provide LBL and regional information.

c. Check game harvested at LBL.

d. Sell LBL user permits and maps.

e. Keep all appropriate daily records as requested by the Forest Service.

f. Deposit in Forest Service designated night depositories daily fee collections.

g. Arrange for basic cleaning services for the North and South Welcome Stations.

2. Provide visitor receptionists for LBL's Nature Station and The Homeplace 1850.

a. Greet and orient visitors.

b. Collect fees for the respective facilities.

c. Keep all appropriate daily records as requested by the Forest Service.

d. Deposit in Forest Service designated night depositories daily fee collections.

3. Cooperatively provide major gift funds development services for LBL.

a. Prepare an annual Funds Development Plan for LBL.

b. Identify major philanthropic markets.

c. Research potential funding opportunities and partnership opportunities for LBL.

d. Prepare grant requests and other solicitation materials.

e Maintain ongoing funds development records.

4. Provide direct delivery interpretive staff for LBL's Golden Pond Planetarium, Nature Station, The Homeplace 1850, Elk & Bison Prairie, and other sites within LBL to meet Forest Service needs.

a. Hire, pay, and supervise direct delivery interpretive staff.

b. Provide interpretive programs and events with direction from, and under the guidelines of, the US Forest Service.

c. Assist in maintenance and care of artifacts and interpretive materials.

d. Provide for maintenance and care of livestock and wildlife under the US Forest Service and US Fish and Wildlife guidelines and direction.

e. Participate in planning and development of physical site, program, and exhibit improvements.

5. Provide the operational needs for LBL's Elk & Bison Prairie.

a. Collect monies from the machine on an as necessary basis.

b. Deliver monies collected to the Forest Service depository.

c. Replace token supply.

d. Replenish brochures in rack as necessary.

e. Clean dollar bill validating equipment weekly.

f. Keep financial and visitation records as required by the Forest Service.

g. Keep the Elk & Bison Prairie free of litter.

h. Maintain the cleanliness of displays.

i. Distribute tokens to LBL staff and facilities as necessary.

6. Administer the operations of the Golden Pond Planetarium and Observatory.

a. Purchase and develop shows for the planetarium.

b. Arrange for the annual maintenance for the Spitz planetarium equipment from Spitz, Inc.

c. Properly maintain all current planetarium and observatory equipment.

d. Promote visitation to the planetarium.

7. Cooperatively provide administration for the LBL Volunteer Program.

a. Identify and develop volunteer opportunities.

b. Recruit volunteers.

c. Train volunteers to the extent LBLA is qualified to do so.

d. Acknowledge volunteer efforts.

e. Maintain volunteer records.

8. Provide administration of funds restricted for specific uses at LBL.

a. Except as otherwise set forth by granting guidelines, the LBLA will retain interest earned on restricted funds for operational needs.

9. Administer an annual membership program.

10. Administer and staff retail operations at the Golden Pond Visitor Center, the Nature Station, The Homeplace 1850, and North and South Welcome Stations for the sale of educational and interpretive items for the benefit of the visiting public.

a. Sell interpretive and educational items, such as publications, maps, visual aids, handicrafts, and other objects directly related to the interpretive and educational themes of the facilities at LBL.

b. Sell visitor convenience items as relate to the enjoyment of LBL, such as tick spray, sunscreen, etc.

c. Not sell artifacts protected by the Antiquities Act of 1906 (P.L. 59-209), the Archeological Resources Protection Act of 1979 (P.L. 96-95), and the Alaska Historic Preservation Act of 1971, as amended.

d. By this agreement, not be granted the right to sell items that would infringe upon applicable contract rights of concessionaires.

e. Maintain professional standards and quality in all items produced or sold.

f. Sell items at fair market value.

g. Display the items in good taste and in keeping with the general design and decor of the Forest Service facilities at that location.

11. Provide soft drink and snack machines throughout LBL for the convenience of LBL visitors.

12. Accounting Records

a. Be solely responsible for the financial arrangements for the work under this agreement, including costs of obtaining stocks of LBLA materials and for the receipt and disposition of monies from sales, and hold harmless the Forest Service or its officers responsible for loss of LBLA materials or money from sales, or for any

other financial loss incurred as the result of this agreement.

b. Keep appropriate financial books, records, and accounts pertaining to this Agreement to standards acceptable to the Forest Service or generally acceptable accounting practices.

c. Unless otherwise protected by law, allow authorized officials or Agents of the Forest Service, or any other Federal agency authorized to do so, to examine such financial books, records, and accounts of the LBLA, as deemed necessary by the Forest Service, or other authorized Federal agency, and that these records and accounts will be retained by the LBLA and kept available for at least 3 years, unless disposition is otherwise authorized in writing by the Forest Service. Such books, records, and accounts may be examined at any reasonable and convenient time during such periods.

d. Provide two copies of form FS 2300-5, Annual Report Interpretive Associations by April 15 each year to the Regional Forester with a copy to the Forest Supervisor.

13. Other

a. Designate a LBLA member or employee who is authorized to act as liaison with the Forest Service.

b. Maintain a distinct separation, evident to the public, between the activities and management of the LBLA and those of the Forest Service.

c. Reimburse the Forest Service for member benefit coupons on discounted LBL fees.

d. Purchase at a minimum the Forest Service mandated level of liability insurance for all LBLA activities.

B. FOREST SERVICE SHALL:

1. Technical Assistance

a. Provide broad program direction and guidance for LBL's Nature Station, The Homeplace 1850, and Elk & Bison Prairie.

b. Provide technical assistance as required, i.e. provide prompt updates to facility staff regarding operational changes, interpretive planning, etc.

c. Include the Golden Pond Planetarium in promotional materials produced for LBL.

2. Sale Items

a. Cooperate with the LBLA in the planning and design of merchandise appropriate for sale by the LBLA at the Forest Service facilities.

b. Maintain the right to request the discontinuance of any sale item deemed inappropriate.

3. Facilities and Equipment

a. Provide the LBLA with such space and other facilities as may hereafter be deemed necessary or desirable by the Forest Service, provided that the Forest Service reserves the right to relocate or withdraw any such facilities, subsequent to reasonable notice, in order to meet the needs of the Forest Service.

b. Provide the LBLA with appropriate storage space for surplus sales inventory.

c. Provide the LBLA with a staging area for unpacking and labeling sale items.

d. Provide the LBLA with adequate administrative office space and interpreter office space.

e. Allow the LBLA to utilize Forest Service meeting rooms as needed for regular business meetings and meetings of the Board of Trustees.

f. Allow the LBLA free use of Forest Service copying and facsimile machines.

g. Provide the LBLA an office/workroom in the Golden Pond Visitor Center for planetarium staff.

h. Allow the LBLA to utilize Forest Service depositories for temporary secure storage of daily sales receipts.

i. Make such surveys and inspections, as the Forest Service deems necessary.

j. Reserve the right to design and construct any new facilities, and shall allow the LBLA review and comment on any plans thereof.

k. Provide the LBLA with incidental utility services at each assigned facility, including water, electricity, heat, air conditioning, telephone, to the extent these utilities are required for the operation of the building for Governmental purposes.

l. Provide all general maintenance and repair services for the Government-owned buildings. With the exception of basic cleaning of the North and South Welcome Stations, which will be provided by the LBLA.

m. Provide computers, computer software, and computer support services for LBLA interpretive staff.

n. Provide non-specialty computer software, and all computer support services for all LBLA functions.

4. Personnel

a. Designate an employee as Interpretive Association Coordinator who will serve as a liaison to the LBLA. The role of the Interpretive Association Coordinator (liaison) is to represent the interests of the Forest Service and to provide assistance to the LBLA; hence, he or she shall not be a board member of the LBLA. His or her scope of LBLA responsibility shall be limited to ensuring that the spirit and intent of this Agreement are fulfilled and to provide expertise to LBLA.

b. Provide all employees who will establish program direction and guidelines for LBL's Nature Station, The Homeplace 1850 and coordinate daily operations.

5. Other

a. Shall old harmless the LBLA for loss of materials or money from sales, or for any other financial loss incurred as the result of this agreement.

b. Provide tokens to LBL's Elk & Bison Prairie for LBLA membership benefits.

C. IT IS MUTUALLY AGREED AND UNDERSTOOD BY AND BETWEEN THE PARTIES THAT:

1. The LBLA's Articles of Incorporation and the LBLA's By-Laws shall comply with requirements of the State in which the LBLA is incorporated. Non-profit status 501(c)(3) must be maintained in accordance with Federal and state laws, and the LBLA will make available for inspection, at the request of the Forest Service, documents demonstrating non-profit status. This Agreement will automatically terminate if non-profit status is lost.

2. Forest Service employees may be members of the LBLA, but shall not be officers, LBLA employees, or members of the Board of Trustees.

3. Forest Service employees shall not represent the LBLA in any matter between the LBLA and the Forest Service. A Forest Service employee shall not participate in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including, but not limited to, executing or negotiating contracts, signing checks, or hiring or firing LBLA employees.

4. Association personnel are not Government employees and are not authorized to undertake any Governmental function or activity on behalf of the Forest Service beyond routine visitor information services and parti-

cipation in museums, living history, or like programs. Association employees shall not engage in activities that would reasonably lead the visiting public to conclude that they are Government employees. No LBLA employee shall wear a Forest Service or other Government employee uniform unless they are under a volunteer agreement. All LBLA employees shall wear some easily observable and readily identifiable indication of LBLA affiliation while working with the public on LBLA business.

5. The Forest Service will authorize the LBLA's entry, occupancy and use of LBL land under the applicable statutory authority when needed.

6. Any activities considered to be accomplished by the parties directly benefiting the Forest Service and requiring a payment by the Forest Service to the LBLA, shall be accomplished using procurement procedures. This agreement by itself, does not limit competition.

7. The rights and benefits conferred by this agreement shall be subject to the laws of the United States governing the Forest Service and to the rules and regulations promulgated hereunder, whether now in force or hereafter enacted or provided; and the mention of specific restrictions, conditions, and stipulations herein shall not be construed as in any way impairing the general powers of supervision, regulation, and control by the Forest Service.

8. Pursuant to Section 22, Title 41, United States Code, no member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this Agreement or to any benefit that may arise there from, but this restriction shall not be construed to extend to this Agreement if made with a corporation or company for its general benefit.

9. The LBLA agrees that all of its activities shall be conducted in accordance with all applicable laws and regulations, both State and Federal. Specifically the LBLA shall comply with the requirements of (a) Executive Order No. 11246 of September 24, 1967; (b) Title V, Section 503 of the Rehabilitation Act of September 26, 1973 (P.L. 93-112), which requires contractors and cooperators to take affirmative action to employ and to advance in employment qualified handicapped individuals; (c) Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the Regulations of the U.S. Department of Agriculture (7 CFR, Part 15) issued pursuant to that Act.

10. In all cases where rights or privileges are granted herein in general or definite terms, the extent of the use of such rights or privileges by the LBLA shall be determined by further written agreement.

11. This agreement is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement or contribution of funds between the parties to this agreement will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This agreement does not provide such authority. Specifically, this agreement does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or other agreement for training or other services must fully comply with all applicable requirements for competition

12. Either party, in writing, may terminate the agreement in whole, or in part, at any time before the date of expiration.

13. Modifications within the scope of this agreement shall be made by the issuance of a bilaterally executed modification prior to any changes being performed.

14. This agreement in no way restricts the Forest Service or the LBLA from participating in similar activities with other public or private agencies, organizations, and individuals.

15. This agreement is executed as of the last date shown below and expires on September 30, 2001, at which time it will be subject to review, renewal, or expiration.

16. The principal contacts for this agreement are:

William Lisowsky	Gaye Luber
USDA Forest Service	Executive Director
Land Between The Lakes	Land Between The
NRA Area Supervisor	Lakes Association
100 Van Morgan Drive	100 Van Morgan Drive
Golden Pond, Kentucky 42211	Golden Pond, Kentucky 42211
(270) 924-2000	(270) 924-2088

IN WITNESS WHEREOF the parties hereto have executed this agreement as of the last date of signature:

USDA Forest Service, LBL NRA

By: _____
William Lisowsky, Area Supervisor

_____
Date

Land Between The Lakes Association

By: _____
Gaye Luber, Executive Director

_____
Date

[Exhibit B]

AFFIDAVIT

THE AFFIANT, after first being duly sworn, states as follows:

1. My name is Pat Osborn and I reside at [address].

2. I am the plaintiff in the case *Osborn v. Haley et al*, Civil Action No. 5:03-CV-00192-R, United States District Court, Western District of Kentucky at Paducah.

3. It is my belief, based upon information from more than one credible source, that at the time I was fired by my employer LBLA, there was a "Memorandum of Understanding" in effect between LBLA and the U.S. Forest Service, Land Between the Lakes National Recreation Area. The memorandum was similar to the one attached as "Exhibit A" to plaintiff's Response to United States' Motion to Dismiss. It also contained a similar provision specifically prohibiting U.S. Forest Service employees from participating in any LBLA decision regarding the hiring or firing of LBLA employees.

/s/ Pat Osborn 1-26-04
Pat Osborn Date

[Jurat omitted in printing]

[Filed Feb. 9, 2004]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

UNITED STATES' REPLY TO PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION TO DISMISS

The United States moved the court to dismiss the above-styled case as against the federal defendant, and plaintiff filed a response. The United States submits as follows in reply thereto.

MEMORANDUM IN SUPPORT OF UNITED STATES' REPLY TO PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION TO DISMISS

INTRODUCTION

While working at Land Between the Lakes Association ("LBL"), plaintiff, a veteran, applied for a Forest Service job. When she was not hired for that job, she filed an inquiry with the Department of Labor to find out whether she was accorded veteran status in the hiring process. She claims that LBL supervisor Gaye Luber and Forest Service manager Barry Haley, unhappy with her Department of Labor inquiry, conspired to fire her from her job at LBL.

The United States filed a motion to substitute the United States for individual federal defendant Barry Haley because he was acting within the scope of employment at all times relevant to the common law tort allegations in the complaint. The United States also moved to dismiss the complaint for lack of jurisdiction because plaintiff failed to file an administrative claim with the Forest Service before bringing suit, as required by the Federal Tort Claims Act.

Plaintiff's sole response is to contest scope of employment. She argues that Haley's alleged act of causing her firing violated an agreement between the Forest Service and LBLA, thus exceeding the scope of his employment under Kentucky law. Response at 2, 3. As explained below, however, plaintiff fails utterly to meet her burden of coming forward with specific facts to refute the scope certification. Accordingly, the United States should be substituted for Barry Haley in this action, which should be dismissed for failure to exhaust administrative remedies under the Federal Tort Claims Act.

ARGUMENT

A certification by the Attorney General is conclusive evidence that the employee was acting within the scope of his employment. Once the certification is filed, and plaintiff seeks to challenge it, the burden of proof on the question of scope shifts to the plaintiff. *See, e.g., Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000); *Day v. Massachusetts Air National Guard*, 167 F.3d 678, 685 (1st Cir. 1999); Taboas v. Mlynczak, 149 F.3d 576, 581 (7th Cir. 1998); *Palmer v. Newton*, 93 F.3d 196, 198 (5th Cir. 1996); *Flohr v. Mackojak*, 84 F.3d 386, 390 (11th Cir. 1996); *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995); *Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994).

Plaintiff fails to meet her burden. Plaintiff argues her complaint "alleges facts that show defendant Barry Haley

acted outside the scope of his employment when performing the acts which form the basis of plaintiff's complaint." Response at 1. The complaint does nothing of the sort. Rather, it states that Haley was employed by the Forest Service at all times relevant to complaint. Complaint at ¶ 6. The complaint further states:

> 15. On June 17, 2002, plaintiff was contacted by telephone by Mr. Robert Kuenzli, an investigator with the United States Department of Labor, and interviewed regarding the written veterans' preference inquiry filed by the plaintiff with the United States Department of Labor.
>
> 16. During plaintiff's conversation with Mr. Kuenzli on June 17, 2002, Mr. Kuenzli asked plaintiff whom he could contact at the U.S. Forest Service to determine if plaintiff had received her veterans' preference points when being considered for the position. Plaintiff told Mr. Kuenzli that defendant Barry Haley should be contacted, and provided his phone number. Plaintiff also stated to Mr. Kuenzli that if defendant Barry Haley found out that plaintiff had filed a veterans' preference inquiry with the U.S. Department of Labor, there was a good chance defendant Barry Haley would cause plaintiff to lose her job.
>
> 17. On June 17, 2002, after his conversation with plaintiff, Mr. Kuenzli contacted defendant Barry Haley by telephone. While investigating the award of veterans' preference points to applicants in the hiring process for the Contract Specialist Trainee, at defendant Barry Haley's insistence, Mr. Kuenzli acknowledged that plaintiff had filed a written veterans' preference inquiry with the Department of Labor.

Complaint at ¶¶ 15-17. The complaint next states that, after Kuenzli's conversation with Haley, Gaye Luber summoned plaintiff to her office and asked her to apologize to Haley, that plaintiff refused, and that two days later plaintiff was fired. Complaint at ¶¶ 18-20.

The foregoing constitute all the "facts" in the complaint concerning Barry Haley's conduct. These factual assertions are insufficient to rebut the Attorney General's certification that Haley acted within the scope of his employment. To be sure, the complaint additionally contains conclusory allegations that Haley "wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff" from LBL. Complaint at 7, 8, 10. These allegations, however, have no putative factual basis in plaintiff's own complaint. Plaintiff's bare assumption of a nexus between her firing and her veterans' preference inquiry is inadequate to provide a factual basis for challenging the scope certification. Plaintiff presents no facts, either in her complaint or in her response to the motion to substitute, that would support her allegation that Haley acted outside the scope of his employment. Accordingly, the Attorney General's certification must stand. *See, e.g., Rogers v. Management Technology, Inc.*, 123 F.3d 34, 37 (1st Cir. 1997).

Plaintiff attached to her response two documents, neither of which provides support for her claims. The first is a memorandum of understanding between LBL and the Forest Service which states in pertinent part that the latter will not interfere in LBL's employment matters. As discussed above, plaintiff alleged no facts to support an inference that Haley even attempted to affect her employment.

Plaintiff also attached to her response a letter from Department of Labor investigator Robert Kuenzli stating that his phone call to Haley caused Osborn to "loose [sic] her job." However, the letter is of no probative value as it is clearly based entirely on plaintiff's complaints to the investigator.

CONCLUSION

For the reasons stated above, in its motion to substitute, and in its motion to dismiss, the United States should be substituted as sole defendant herein in place of federal defendant Barry Haley, and the action should be dismissed for failure to exhaust administrative remedies under the Federal Tort Claims Act.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ W. Brady Miller

W. Brady Miller
Assistant U.S. Attorney
510 W. Broadway, 10th Floor
Louisville, KY 40202
(502) 582-5166

[Certificate of service omitted in printing]

[Filed Mar. 24, 2004]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

UNITED STATES' MOTION TO RECONSIDER ORDER DENYING MOTION TO DISMISS AND SUBSTITUTION OF UNITED STATES FOR FEDERAL DEFENDANT BARRY HALEY

The United States, pursuant to Fed. R. Civ. P. 59(e), moves the court to reconsider its Order entered March 12, 2004, denying the United States' motion to dismiss and overruling the United States' substitution of itself as defendant herein in place of federal defendant Barry Haley. In support, the United States submits the following memorandum of law.

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER DENYING MOTION TO DISMISS AND SUBSTITUTION OF UNITED STATES FOR FEDERAL DEFENDANT BARRY HALEY

The United States, pursuant to Fed. R. Civ. P. 59(e), moves the court to reconsider its Order entered March 12, 2004, denying the United States' motion to dismiss and overruling the United States' substitution of itself as de-

fendant herein in place of federal defendant Barry Haley. In support, the United States submits as follows:

INTRODUCTION

By order entered March 12, 2004, this court denied the United States' substitution of itself as defendant in place of Barry Haley, and overruled the United States' motion to dismiss for failure to file an administrative claim. The court also remanded the action to the Trigg County Circuit Court. (R. 20: Order). In its memorandum opinion accompanying the order, the court found that plaintiff adequately alleged conduct that, if proven, would fall outside the scope of Barry Haley's employment. Since the court believed the United States did not contest the allegations, it accepted them as conclusive on the issue of scope, and found that the United States could not be substituted as defendant. (R. 19: Memorandum and Opinion at 4, 6). The court also found no need for an evidentiary hearing on the issue of scope, again because it believed the United States did not deny plaintiff's factual allegations. (*Id.* at 4). Finally, the court decided that since the United States was not a proper party defendant, the matter must be remanded to the state court. (*Id.* at 6, 7).

The United States moves the court to reconsider its rulings. First, the United States, as evidenced by the answer it filed herein and by the attached Declarations, vigorously contests plaintiff's allegations. At the least, the court should hold a hearing or otherwise further consider the evidence relating to scope, as Barry Haley has done nothing which can be construed to fall outside the scope of his employment.

The United States also notes that, if court reconsiders it rulings herein, allows the substitution, and grants the motion to dismiss, plaintiff would yet have remedies within the federal system. Although the dismissal would be with prejudice as to this action, under the Federal Tort Claims Act, plaintiff may file an administrative claim with the For-

est Service within two years of when her claim accrued. If denied, the claim could then be pursued in federal court under a separate action, provided the requirements of the Act are met.

ARGUMENT

I. THE UNITED STATES CONTESTED AND CONTINUES TO CONTEST PLAINTIFF'S ALLEGATIONS THAT BARRY HALEY ACTED OUTSIDE THE SCOPE OF HIS EMPLOYMENT.

A. The Answer Specifically Refutes Plaintiff's Allegations.

The United States filed its answer herein on May 19, 2003. (R. 7: Answer). In it, the United States denied each and every factual allegation by plaintiff against Barry Haley. Plaintiff's "First Cause of Action" is alleged against Luber alone. Plaintiff's "Second Cause of Action, Interference with Employment Relationship" is alleged against Haley alone. (R.1: Notice of Removal, Exhibit 1 (complaint) at 7, ¶¶ 27-31). The United States specifically denied the allegations contained therein. (R. 7: Answer at 3, ¶¶ 12-14). This includes a denial that Haley acted outside the scope of his employment. (R. 1: Notice of Removal, Exhibit 1 at 7, ¶ 29; R. 7: Answer at 3, ¶ 14).

Plaintiff's "Third Cause of Action, Conspiracy to Wrongfully Discharge Plaintiff" is alleged against both Luber and Haley. (*Id.* at 8, ¶¶ 32-38). The United States specifically denied the allegations contained therein. (R. 7: Answer at 3, ¶¶ 15-17). Plaintiff's "Fourth Cause of Action, Conspiracy to Interference with Plaintiff's Employment Relationship" is alleged against both Luber and Haley. (*Id.* at 10, ¶¶ 39-45). The United States specifically denied the allegations contained therein. (R. 7: Answer at 3-4, ¶¶ 18-20). This includes a denial that Haley acted outside the scope of his employment. (R. 1: Notice of Removal, Exhibit 1 at 10, ¶ 41; R. 7: Answer at 3, ¶ 19).

Plaintiff's "Fifth Cause of Action, Outrageous Conduct" is alleged against both Luber and Haley. (*Id.* at 11, ¶¶ 46-53). The United States specifically denied the allegations contained therein. (R. 7: Answer at 4, ¶¶ 21-23). Plaintiff's "Sixth Cause of Action, Conspiracy-Outrageous Conduct" is alleged against both Luber and Haley. (*Id.* at 13, ¶¶ 54-61). The United States specifically denied the allegations contained therein. (R. 7: Answer at 4, ¶¶ 24-26).

"The theory of Rules 8(b) and (d) is that a defendant's pleading should apprise the opponent of the allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to established to enable plaintiff to prevail." *Wright & Miller*, 5 Fed. Prac. & Proc. Civ. 2d § 1261 at 1 (2004) (citing cases). The filing of a responsive pleading by the United States squarely placed in controversy the matters asserted in the complaint, and put all on notice that the United States contested plaintiff's allegations against Mr. Haley.

B. Both Barry Haley and Gaye Luber (now Gieselman) Contest Plaintiff's Allegations.

"Plaintiff's action is based on the fact that she was discharged from her employment at LBLA in retaliation for exercising her legal right in requesting an [Department of Labor] inquiry." (R. 18: Plaintiff's Reply to Motion to Dismiss at 3). The foregoing statement by plaintiff forms the gravamen of her entire complaint. (See R. 1: Notice of Removal, Exhibit 1 (complaint)).

Attached are Declarations from Barry Haley and Gaye Luber (now Gaye Gieselman) specifically contesting plaintiff's allegations that she was fired in retaliation for contacting the Department of Labor regarding consideration of her veteran's preference in connection with her application for a Forest Service position. In his Declaration, attached hereto as Exhibit 1, Barry Haley asserts that he is employed by the U.S. Department of Agriculture ("USDA") Forest Service as Business Manager at Land Between the Lakes National

Recreation Area. (Haley Declaration at ¶ 1). Mr. Haley further states that in Spring 2002, the USDA Forest Service advertised the position of Contracting Officer Trainee to work in the Business Department at Land Between The Lakes National Recreation Area. (*Id.* at ¶ 2). Mr. Haley states that applications for the position were received at the USDA Forest Service Regional Personnel Office in Atlanta, Georgia, for ranking and personnel certification. (*Id.*) The Personnel Office sent to Haley's office a personnel certificate ranking the candidates for the position. (*Id.*). By regulation, Mr. Haley could only consider the top three candidates, who were all highly qualified Veterans Preference candidates. (*Id.*). Pat Osborn was not listed as one of the top three candidates, Haley did not know she had applied for the position. (*Id.*). On May 20, 2002, Haley announced the selection of the new Contracting Officer Trainee. (*Id.* at ¶ 3). On June 17, 2002, he received a telephone call from Robert Kuenzli at the Department of Labor inquiring whether Pat Osborn's status as a veteran was considered in connection with the posting for the Contracting Officer Trainee position. (*Id.* at ¶ 4). After Haley's office faxed to him a copy of the personnel certificate, Mr. Kuenzli confirmed that the matter was handled correctly. (*Id.*).

Mr. Haley further states that, before Gaye Luber terminated Pat Osborn's employment with the Land Between the Lakes Association, he had no communication with Ms. Luber about the Department of Labor inquiry, or whether Osborn's veteran status was considered in connection with her application for Contract Officer Trainee. (*Id.* at ¶ 5). Mr. Haley states that he had no advance knowledge of the termination of Osborn's employment at LBLA, that he did not advise Gaye Luber regarding the matter, and that he did not attempt to influence her independent decision to fire Ms. Osborn. (*Id.* at ¶ 6).

Gaye Gieselman, formerly Gaye Luber, has also submitted a Declaration further controverting plaintiff's claims. See Declaration, attached hereto as Exhibit 2. Ms. Gie-

selman states that, acting as Executive Director of Land Between the Lakes Association, Inc., she terminated Pat Osborn from her employment with LBLA on June 19, 2002. (Gieselman Declaration at ¶ 2). She states that at the time she terminated Pat Osborn, she had no knowledge that Osborn had raised any sort of issue or had complained to anyone, either formally or informally, regarding whether her veteran's status was considered in the course of her job application with the Forest Service. (*Id.* at ¶ 3). At the time she terminated Pat Osborn, Gieselman had not discussed this issue with Barry Haley, Pat Osborn, or anyone else, and did not know it existed. (*Id.*).

Ms. Gieselman further states that, prior to Osborn's termination, Gieselman met with her on June 17 to discuss problems with her employment, and that her veteran's preference status was not mentioned at all during this meeting. (*Id.* at ¶ 4). She also states that Osborn's alleged complaint about consideration of her veteran status in applying for a Forest Service job was not, and could not have been, a factor in the decision to terminate Ms. Osborne [sic], because she, Ms. Gieselman, did not know about the complaint. (*Id.* at ¶ 5).

The foregoing Declarations by Barry Haley and Gaye Gieselman (formerly Gaye Luber) provide ample evidence that Barry Haley never acted outside the scope of his employment and directly and specifically controvert any allegations to the contrary.

II. BECAUSE THERE IS AN ISSUE OF MATERIAL FACT WITH REGARD TO WHETHER HALEY ACTED WITHIN THE SCOPE, THE COURT SHOULD FURTHER CONSIDER THE ISSUE, INCLUDING, IF NECESSARY, FURTHER DEVELOPMENT OF THE RECORD.

As shown above, the United States vigorously contests plaintiff's allegations that Barry Haley acted outside the scope of his employment. The United States respectfully

requests that the court revisit this issue and decide it in favor of the United States, based on its answer filed herein and on the additional evidence provided. Alternatively, the United States asks that the court allow limited discovery and/or hold an evidentiary hearing to resolve this issue.

As argued previously, plaintiff has not met her burden in attempting to contest the certification of scope. (R. 17: Reply at 2); *see also Schrob v. Catterson*, 967 F.2d 929, 935 (3d Cir. 1992) (if certification is challenged, plaintiff must come forward with specific facts rebutting the certification); *Raisig v. United States*, 34 F. Supp. 2d 1053, 1055 (W.D. Mich. 1998) ("The plaintiff must come forward with specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation." (citations omitted)). This burden must be met by a preponderance of the evidence. *Id.* at 1054. Here, the certification of the U.S. Attorney that Haley acted within scope, together with the Declarations of Haley and Gieselman (Luber), are sufficient to establish scope absent specific facts from plaintiff. If, as Mr. Haley and Ms. Gieselman both have stated, they had no communication regarding Osborn's veterans preference inquiry or her firing, then Haley cannot possibly have acted outside the scope of his employment. Plaintiff has put forward no facts sufficient to contest the showing that Haley acted within scope.

At the least, however, the court should find that the evidence now in the record presents a legitimate issue of material fact. If the court continues to believe that plaintiff has met her burden of putting forward specific facts supporting an argument that Haley acted outside the scope, then limited discovery may be indicated regarding the issue. *See, e.g., Maron v. United States*, 126 F.3d 317, 322 (4th Cir. 1997); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994). Such discovery should be "circumscribed as narrowly as possible," and limited to scope of employment issues. *Schrob*, 967 F.2d at 936; *see also Maron*, 126 F.3d at 327; *Gutierrez de*

Martinez v. Drug Enforcement Administration, 111 F.3d 1148, 1154-55 (4th Cir. 1997).

Allowing limited discovery on the scope issue, including exploration of Osborn's employment record, could also reveal evidence supporting an argument that, even if the allegations are true, the alleged conduct falls within the relevant Kentucky law on scope. For example, plaintiff alleges that Haley influenced Luber to fire her because he was upset plaintiff filed a Department of Labor complaint. Assuming, for the sake of argument only, that Haley and Luber interacted regarding plaintiff's employment, Haley would conceivably know of any job-related problems that could have contributed to Osborn's firing, such as poor work performance, bad attitude, being a trouble-maker, or the like. In such a scenario, Haley's alleged conduct of causing Osborn's firing could be construed as for the benefit of the Forest Service, due to that entity's interest in not having its employees work closely with undesirable or poor-performing "Forest Service partners." Such conduct arguably would have taken place within the spacial and temporal limits of Haley's work, would be similar to his work as Business Manager, would further his employer's goals of partnering with competent contract employees in a healthy and productive work environment, and would not be unexpectable by the Forest Service. *See Booker v. GTE.net LLC*, 350 F.3d 515, 518-19 (6th Cir. 2003).

If, after discovery limited as described above, the court determines that a genuine issue of material fact remains, a pretrial hearing is indicated in order to resolve whether the United States should be substituted as the proper party defendant. *Taboas v. Mlynczak*, 149 F.3d 576, 580 (7th Cir. 1998). At such a hearing, the court would hear evidence from each party on the scope of employment issue. *Arthur v. United States*, 45 F.3d 292, 295 (9th Cir. 1995); *Melo*, 13 F.3d at 747; *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994). As with discovery on the scope issue, any such hearing should be "narrowly circumscribed" and limited to the

facts in material dispute which have a bearing on scope of employment. *Schrob*, 967 F.2d at 936; *Gutierrez*, 111 F.3d at 1154-55.

Here, the court decided the scope issue against the United States without holding a hearing, stating the United States had not presented evidence contesting plaintiff's allegations. As argued above, the answer filed by the United States and the additional evidence submitted herewith demonstrate that the United States contests the allegations and that an issue of fact exists. Moreover, the case cited by this court in ruling that no evidentiary hearing was necessary seems to support the right of the United States to a hearing prior to any adverse ruling on scope. In the case of *Rutkofske v. Norman*, 114 F.3d 1188, 1997 WL 299382 (6th Cir. (Mich.) June 4, 1997), the court stated:

> The government supported its motion to dismiss with evidence—in the form of the certification—that [federal employee's] conduct was within the scope of his employment. Our prior cases make it clear that a plaintiff must submit relevant evidence in response to such a motion or face dismissal. Because Rutkofske failed to present any relevant evidence to oppose the motion, there was no fact at issue and no need to hold an evidentiary hearing.

Id. at **4. Respectfully, the above-cited section of the opinion appears to suggest that all the government need do to sufficiently support a motion to dismiss, is to file a certification of scope. If plaintiff then submits sufficient evidence in opposition, a hearing is warranted. As this court observed, the *Rutkofske* court noted that other courts addressing the issue have held a hearing necessary "only if there is conflicting evidence as to a material fact." *Id.*, citing *McAdams v. Reno*, 64 F.3d 1137, 1145 (8th Cir. 1995); *Kimbro*, 30 F.3d at 1509; *Melo*, 13 F.3d 747. However, the courts in two of the cited cases—as well as the *Rutkofske*

court—applied that test to plaintiff's failure to rebut the Attorney General's certification, not to the government. *McAdams*, 64 F.3d at 1145 (McAdams "failed to come forward with sufficient evidence to undermine" certification); *Kimbro*, 30 F.3d at 1509 (certification given *prima facie* effect "which obliges plaintiff to come forward after reasonable discovery with evidence supporting his allegations both as to scope and as to the merits"). The third case cited by *Rutkofske* may prove particularly instructive in the instant case. In *Melo*, 13 F.3d at 736, 747, plaintiff brought an action against a United States Attorney and others claiming that they conspired to interfere with her contractual relationships. *Id.* at 739. The district court concluded that for purposes of determining scope it must accept as true the facts alleged in the complaint. *Id.* at 740. Because the conduct alleged, if true, would have exceeded the scope of the U.S. Attorney's employment, the district court denied, without a hearing, the United States' motion to substitute. *Id.* at 741. Concluding "that a district court need not accept the allegations of the complaint as true when deciding a motion for substitution," the Third Circuit reversed and remanded for a hearing on the issue of scope. *Id.* at 739. This court should follow the same path as the court in *Melo*. To let stand its decision in this case would mean that all a plaintiff need do to defeat a substitution motion is to allege conduct on the part of a defendant which, if proven, would fall outside the scope of employment. A federal employee who legitimately contests said allegations, as here, is entitled to have the scope issue determined in a federal forum. *See, e.g., Kimbro*, 30 F.3d at 1505 (though scope question and merits in case "often overlap, sometimes exactly," Westfall statute precludes remand to state court before scope issue is resolved).

CONCLUSION

Based upon all of the foregoing, the United States respectfully requests that the court grant its motion to reconsider its Order entered March 12, 2004, overruling the

United States' motion to substitute itself as defendant, and denying its motion to dismiss. The United States respectfully requests that the court enter a finding that federal employee Barry Haley acted within the scope of his employment, substitute the United States, and dismiss the case. Alternatively, the United States asks the court to provide both parties the opportunity for discovery specifically limited to the issue of scope, and/or conduct an evidentiary hearing on that narrow issue.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ W. Brady Miller
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[Certificate of service omitted in printing]

[Exhibit 1]

DECLARATION PURSUANT TO 28 U.S.C. § 1746

1. I am Barry Haley, employed by the U.S. Department of Agriculture Forest Service as Business Manager at Land Between the Lakes National Recreation Area.

2. In Spring 2002, the USDA Forest Service advertised the position of Contracting Officer Trainee to work in my Business Department at Land Between The Lakes National Recreation Area. Applications for the position were received at the USDA Forest Service Regional Personnel Office in Atlanta, Georgia, for ranking and personnel certification. The Personnel Office sent to my office a personnel certificate ranking the candidates for the position. My consideration was limited by regulation to the top three candidates who were all highly qualified Veterans Preference candidates. Pat Osborn was not listed as one of the top three candidates, and I did not know she had applied for the position.

3. On May 20, 2002, I announced the selection of the new Contracting Officer Trainee.

4. On June 17, 2002, I received a telephone call from Robert Kuenzli at the Department of Labor. Mr. Kuenzli inquired whether Pat Osborn's status as a veteran had been considered in connection with the posting for the Contracting Officer Trainee position. My office faxed to him a copy of the personnel certificate on the position from the Forest Service Personnel Office. Mr. Kuenzli confirmed that the matter was handled correctly.

5. Before Gaye Luber terminated Pat Osborn's employment with the Land Between the Lakes Association, I had no communication with Ms. Luber regarding the Department of Labor inquiry to my office, nor regarding whether Osborn's veteran status was considered in connection with her application for Contract Officer Trainee.

6. I had no advance knowledge of the termination of Pat Osborn's employment with Land Between the Lakes Association. I did not advise Gaye Luber regarding the matter, nor did I attempt to influence her independent decision to fire Ms. Osborn.

Certification

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 22nd day of March, 2004.

/s/ Barry W. Haley
Barry Haley

[Exhibit 2]

DECLARATION PURSUANT TO 28 U.S.C. § 1746

I, Gaye Gieselman, do declare and state as follows:

1. I was known as Gaye Luber at the time of the events in question in this litigation.

2. Acting as Executive Director of Land Between the Lakes Association, Inc., I terminated Pat Osborn from her employment with LBLA on June 19, 2002.

3. At the time I terminated Pat Osborn, I had no knowledge that she had raised any sort of issue or registered any sort of complaint, formal or otherwise, to any person or entity, regarding whether her veteran's status was considered in the course of her job application with the Forest Service. At the time I terminated Pat Osborn, I had not discussed this issue with Barry Haley, Pat Osborn, or anyone else, and did not know it existed.

4. Prior to her termination, I met with Ms. Osborn on June 17 to discuss problems with her employment. Her veteran's preference status was not mentioned at all during this meeting.

5. Pat Osborn's alleged complaint about consideration of her veteran status in applying for a Forest Service job was not and could not have been a factor in my decision to terminate Ms. Osborne [sic], because I did not know it had occurred.

Certification

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 22 day of March , 2004.

/s/ Gaye Gieselman
Gaye Gieselman

[handwritten telephone number?]